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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

NELSON E. WEBER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

The Petitioner, Nelson E. Weber, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming an order revoking probation entered by the United States District Court for the Southern District of Illinois, Southern Division.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet officially reported. It is printed in the Appendix to this Petition. (A. 1)

JURISDICTION

The judgment of the Court of Appeals affirming the revocation of probation in the District Court was entered on February 17, 1971. (A. 8) A timely Petition for Rehearing was filed (A. 9), and denied by the Court of Appeals on March 8, 1971. (A. 20) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does Rule 23(c) of the Federal Rules of Criminal Procedure, requiring special findings of fact on request, apply only to issues made by indictment and not guilty plea, or is it applicable wherever, in a criminal case, contested issues of fact are drawn for resolution by the fact finder?

2. When it appears that the trial court, in ordering revocation, relied on a document without evidentiary value, may a reviewing court look to other parts of the record to support the revocation order, even where the fact finder makes it clear on the record those other parts he considered inconsequential?

3. Where, as here, special findings are refused, is a Court of Appeals free to affirm on a different theory than that on which the trial court revoked probation and imposed an eighteen month sentence?

4. The basis of revocation here is the making of false statements to a government agency, punishable criminally under 18 U.S.C. 1001 and 26 U.S.C. 7206. May, on a re-

vocation proceeding, jail sentences be imposed where the standard of proof is theoretically by a preponderance of evidence, and actually is an obligation imposed both by the trial and appellate courts to disprove the charges?

5. If the charge is violation of federal criminal laws, is not the standard of proof beyond reasonable doubt?

6. Is settlement in full of income tax liabilities a permissible condition of probation?

STATEMENT OF THE CASE

This is a prayer to review affirmance by the United States Court of Appeals for the Seventh Circuit of an order revoking probation and sentencing the petitioner to a period of eighteen months in the custody of the Attorney General. The charges of the probation officer were that this petitioner had filed a false offer in compromise on his tax liabilities and a false statement of financial condition.

The facts leading to the judgment are as follows:

On August 26, 1954, this petitioner was convicted on his plea of guilty to allegations that he did wilfully attempt to evade his income tax liabilities for the years 1958 through 1960 in violation of Title 26, U.S.C. §7201. He was fined in the cumulative sum of $15,000.00, given sixty days within which to pay the fine and the costs of prosecution and sentenced to a period of three years probation, which incorporated the usual general conditions and made a special provision as follows:

> "Probationer is to make settlement in full with the Internal Revenue Service for Taxes owed for the calendar years 1958 through 1960, inclusive, including

> any legal penalties and interest, within the probation period. Probationer has the full right without any prejudice to this judgment entered to fully and completely and without restriction contest any tax and defend against any taxes that may be improperly taxed against him." (App. 1-4)

On August 21, 1967, the probation officer reported to the Court that the petitioner had paid the fine and the court costs within an additional sixty days from the date initially set by the court. The report of the probation officer asked that the probationary period be extended an additional two years to August 25, 1969, to settle his tax liability pursuant to the special provision. (App. 4-6)

Eleven days before the expiration of the five year term the probation officer requested the Court to issue a warrant to bring the petitioner before the Court to show cause why his probation should not be revoked, setting forth as grounds therefor the following:

> "According to the office of the Regional Counsel of the Internal Revenue Service, Mr. Weber has not fulfilled the terms of his probation insofar as settling in full his income taxes owed for the years 1958 through 1960. He has filed an alleged false offer in compromise on his tax liabilities in that: he filed a false Statement of Financial Condition; he has failed to cooperated with Internal Revenue Agents in their attempts to ascertain whether he has secreted assets. . . ." (App. 7-8)[1]

A warrant issued on the basis of the representation in the probation officer's report and the petitioner was arrested and released on bond pending this proceeding in an amount of $1,000.00, O.R. (App. 8-9) The petitioner made

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[1] Further grounds concerning possession and denied inspection of safe deposit boxes were abandoned on trial.

a motion to dismiss the order to show cause for insufficiency of the allegation to charge a violation of federal law, and otherwise because the report stated no violation of the conditions of probation. (App. 9-11) That motion was denied.

Thereafter proceedings were had in open court on October 30 and 31, and December 17, 1969, before the District Court, sitting without a jury. There was admitted into evidence Government's Exhibit 1, an offer in compromise, submitted by the petitioner and his wife on February 17, 1967, which stated, as the basis for submitting that offer, an inability to pay the tax. Exhibit 2 was a Statement of Financial Condition submitted to Internal Revenue simultaneously. On the document as item 6 it was stated that the petitioner and his wife did business in the three years prior thereto at Capitol Bank and Farmers State Bank. Item 10 asking for life insurance policies now in force indicated "none". Item 17 indicated that the petitioner and his wife had no securities such as stocks, bonds, etc. (App. 16)

Bank records established that the petitioner, Nelson Weber, was the sole owner of Capitol Aircraft Company (App. 25-26), with which the proof was in part concerned.

The Securities

The evidence tending to prove the denial of ownership of securities was false is as follows:

A person in charge of the records of the First National Bank of Chicago presented records of that bank dealing with United States Treasury Bonds sold. He testified to the sale of three United States Treasury Bonds in the face amount of $5,000.00 each on October 11, 1960, which bonds matured May 15, 1968. (App. 21)

One Otto Key presented records from the Bank of St. Louis which show that Capitol Aircraft had surrendered

three five thousand dollar bonds which had matured on May 15, 1968, and which in turn were exchanged for bonds maturing in 1975. He testified to a conversation with the petitioner in May of 1968 when the petitioner surrendered the three bonds, and a receipt was given him therefor. The receipt recited the nature of the exchange and the bonds were forwarded to the Federal Reserve Bank in due course. New bonds were received and subsequently were picked up by a person signing N.E. Weber on behalf of Capitol Aircraft Company of St. Louis. He testified to a conversation with Mr. Weber wherein Mr. Weber complained that he had been given a credit of $15,000 on the bank account of Capitol Aircraft when he surrendered the bonds and a $15,000 debit when the new bonds were issued. It was his complaint that the entries did not belong on the records of Capitol Aircraft.

This witness further testified that the bonds involved were bearer bonds and that the transaction would have been handled the same way whether the bonds belonged to Mr. Weber or not, that they could be redeemed by simply turning them over at almost any bank, by whomever had them in their possession. (App. 23-25)

The further evidence concerned the purchase of government bonds by National Insurance Underwriters receipted for by N. E. Weber, as business manager. T' ese are shown by exhibits, or by oral testimony of Walter L. Bauer, Special Agent, Internal Revenue Service, who said he made notes from the records of Illinois National Bank before those records were destroyed (App. 34-38). Added to this is the testimony of an officer of the National Aviation Underwriters, who stated he made a search of certain

numbered bonds purchased by that entity and that there was no record of such numbers. They are:

Bond No.	Exhibit No.	Records Existing At National	Record Of Surrender*	Maturity Date
*8914	33	Not asked	No record	8-15-64
*9263	33	Not asked	No record	8-15-64
11448	39	Not asked	Not asked	5-15-68
*42314	Bauer	No record	No record	8-15-64
*42315	Bauer	No record	No record	8-15-64
*85461	Bauer	No record	No record	8-15-64
*85462	Bauer	No record	No record	8-15-64

Evidence relating to bonds purchased by Capitol Aircraft Company and receipted for by Nelson Weber follow, together with Record of Surrender, Exhibit 36.

Bond No.	Exhibit No.	Record of Surrender	Maturity Date
10316	22	Not asked	8-15-68
*42678	35	No record	8-15-64
*42679	35	No record	8-15-64
*82620	34	No record	8-15-64
*82621	34	No record	8-15-64
42588	43	No record	8-15-64

Those bonds which matured in August of 1964 were apparently purchased in 1959 (about 8 years prior to the financial statement made in February, 1967). Only of those marked by the asterisk above was any effort made to establish whether they were still outstanding at the time of trial. This was done by a certain Exhibit 36, which purported to be a certificate that the bureau of public debt had no record of the bonds being surrendered.

Exhibit 36 is in words and figures (excepting the seal) as follows:

"CERTIFICATE

"I hereby certify that I am the Commissioner of the Public Debt of the Department of the Treasury of the United States; that the records of said Bureau, of which I am official custodian, show that coupon 5 percent Treasury Notes, Series B-1964 due August 15, 1964, Nos. 8,914, 9,263, 42,314, 42,315, 42,580, 42,678, 42,679, 85,461, 85,462, 85,620, 85,621, 85,723 and 85,724, for $5,000 each, were issued from stock consigned to the Federal Reserve Bank of Chicago.

"I further certify that the records of said Bureau show that said notes are still outstanding as of the date of this certificate, none of them having been received by said Bureau after redemption up to the present time.

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Treasury Department this 23rd day of October, 1969.

"By direction of the Secretary of the Treasury:

Donald M. Merritt
Donald M. Merritt

"Commissioner of the Public Debt"

This exhibit was admitted into evidence pursuant to Rule 27 of the Federal Rules of Criminal Procedure, as it incorporates Rule 44 of the Federal Rules of Civil Procedure. Objection to the admission of the document on the ground of deprivation of cross-examination and confrontation and on the ground that it did not comply with the Rules relied upon were duly made. (App. 32)

On Appeal, the United States conceded that Rule 44 had not been complied with. (A. 6)

This was the only evidence that these overdue bonds, which bore no interest after maturity had not been surrendered to the government at the time of the February, 1967, statement, or at the time of trial in 1969.

The Seventh Circuit, however, found the failure to observe the rule not conclusive, holding:

> "... [A] revocation hearing is an informal proceeding where rules of evidence need not be strictly observed. *United States* v. *Cates*, 402 F. 2d 473, 474 (4th Cir. 1968). In this hearing without a jury, it will be presumed that the district judge accorded only appropriate weight to this exhibit.[2] Nothing contra was

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[2] We submit that the Court of Appeals presumption that the district judge accorded it only appropriate weight is negated by the record:

> "The Court: * * * I think the big thing you've got to concern yourself with here is $55,000.00.
> "Mr. Casey: And the Government Bonds.
> "The Court: Yes.
> "Mr. Casey: Well —.
> "The Court: Traced into his possession, interest stopped on them, still they're not paid.
> "Mr. Casey: That's right, Your Honor.
> "The Court: That means that he's got them." (App. 43)
>
> * * *
>
> "The Court: It was shown that these bonds were traced into his company which he's the sole owner, $55,000.00 worth. Now, what has he done with it. there's still owing by somebody — still owing by the Government to somebody — ." (App. 44)
>
> * * *

(Footnote 2 continued)

introduced by defendant." (A. 6)[3]

The Insurance and Bank Accounts

An accountant with the New York Life Insurance Company testified that it had in effect four life insurance

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"The Court: Well, there's — the bonds are still owing by the Government.

"Mr. Casey: Well, that's true, Your Honor.

"The Court: And the money from the bonds have been traced in to him. Now, has he burned the bonds or what did he do with them?" (App. 46)

• • •

"The Court: And it shows that those bonds are still outstanding, and it shows further, to my — by my analysis of what happened, that he's trying to hide them." (App. 47)

The record clearly shows that the District Court accorded great weight to Exhibit 36, for it was only on the basis of Exhibit 36 that the foregoing remarks could have been made.

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[3] The petitioner did not testify on the revocation hearing. As this Court will note, the Court of Appeals considered there was some burden on him to refute this worthless exhibit. This indication that petitioner had a burden of disproof was shared by the trial court.

"The Court: Well, they've got evidence here that shows he has this much assets, now, he didn't take the stand and deny it. (App. 42)

• • •

"The Court: Well, there's no dispute about that, that's been done, that's water over the dam, the big issue in this lawsuit is these Government Bonds.

"Mr. Casey: Well, they show that he bought the bonds in '59 and '60, they show that in 1969 they haven't been redeemed. They say, well, he must still have them.

(Footnote 3 continued)

policies wherein the insured was named as Nelson E. Weber and all of them went into effect either in the 1920s or early thirties. He testified that they had a present

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"The Court: Well, if he didn't—if he doesn't want to have his probation revoked, why doesn't he come in and explain it?

"Mr. Casey: Well, Your Honor, we're trying to explain it.

"The Court: Well now, there's only one person that can explain that, and that's by evidence, you can't explain these things without evidence." (App. 46)

• • •

"The Court: Well, why didn't he get on the stand and deny it? (App. 47)

• • •

"The Court: Didn't get on this stand and deny it.

"Mr. Casey: Third parties—pardon me?

"The Court: Didn't get on this witness stand and deny it.

"Mr. Casey: Well—

"The Court: Well, here—here's a man that the Court has said, I'm going to give you probation, I want you to do your best to get this job paid up. Now, is he fair with the Court when he didn't get on the stand and tell him?" (App. 50)

The Court of Appeals also found significance in the petitioner's failure to testify and to respond to the trial court's remarks:

". . . . The Government traced $65,000 in government notes to defendant even though they were purchased in company names. Those notes had also been omitted from the financial statement defendant submitted to the Government on February 17, 1967, when he endeavored to compromise his $200,000 tax liabilities for $10,000. Defendant did not deny continuing ownership of the notes during the revocation hearings despite the reiterated importuning of the trial judge." (A. 6-7)

cash value of slightly less than $4800. He further testified that all of the policies had been assigned in October of 1941, which assignments were released November 15, 1961. It was the essence of his testimony that no notice to the petitioner of the releases were reflected in the company's records. (App. 17-20)

An executive of Country Life Insurance Company testified that his company had a policy on one Nelson E. Weber in the face amount of $2,000.00, which was surrendered on July 11, 1969, for the amount of $394.36. That amount included actual surrender value in the amount of $93.10 and dividends were represented by the remainder. He was unable to state the value of the policy as of February 17, 1967. (App. 20-21)

The witness, Otto Key, testified that Capitol Aircraft had a bank account with a balance of $477.64 on February 15, 1967 at the Bank of St. Louis.

The trial court obviously considered the insurance policies and the bank account of no significance in coming to his determination of revocation. When trial counsel addressed himself to these matters after trial, he was abruptly concluded:

> "Mr. Casey: . . .
>
> "First, the insurance policies, we concede that the Defendant had these insurance policies. Confession, of course, is meaningless in view of the Government's proof which was overwhelming, but we don't, in any way, dispute it, the Court heard the evidence, it's quite clear that he had these policies and they weren't disclosed on the financial statement.
>
> "And I think the Court has to go a step further and say, well, was the disclosure willful and deliberate. And I would like to direct the Court's attention to the various income tax returns that were filed during this

period, and in each one of those returns, dividends from his various policies are reported, they're small, minute, less than five and $10.00, each once, each year, they're disclosed. So it's the Government's position —is that in his tax returns he disclosed the existence of these policies and that in making the financial statement he willfully, deliberately concealed them.

"The Court: Well, I don't think you have to concern yourself about any $10.00 item or anything like that, I think the big thing you've got to concern yourself with here is $55,000.00." (App. 42-43)

The basis for the trial court's order of revocation is clear all through the colloquy (App. 42-53), and he stated it concisely when he said "the big issue in this lawsuit is these government bonds." (App. 46)

Yet the Court of Appeals, faced with a certificate of no record that was concededly wrongfully admitted into evidence, found justification for the order of revocation in that in which the trial court was not concerned:

"Even disregarding that exhibit, there is ample evidence to support the revocation of defendant's probation. Defendant concededly had six life insurance policies in the total amount of $8,000 although he advised the Government on February 17, 1967, that he had no such policies. At the same time, he neglected to state that his sole proprietorship did banking business with the Bank of St. Louis." (A. 6)

Request for Special Findings

Several days after[4] the order of revocation and the imposition of the sentence of 18 months, the defense re-

[4] The Court of Appeals, in its opinion, dallied a bit with the timeliness of the request, but for purposes of its opinion, assumed timeliness "arguendo." It, thus, does not become an issue on this Petition.

quested the Court to find facts specially pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure. This the trial court refused to do finding a revocation hearing—even though evidence be taken—is not such a "trial" as is contemplated by the Rule.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

RULE 23—RULES OF CRIMINAL PROCEDURE

* * *

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

As amended Feb. 28, 1966, eff. July 1, 1966.

TITLE 18, UNITED STATES CODE, SECTION 1001

§ 1001. Statements or entries generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

TITLE 18, UNITED STATES CODE, SECTION 3651

§ 3651. Suspension of sentence and probation

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had;

TITLE 26, UNITED STATES CODE, SECTION 7206

§ 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

REASONS FOR GRANTING THE WRIT

This Court should issue its writ of certiorari to the United States Court of Appeals in this cause on the following grounds:

I.

THIS CASE PRESENTS THE QUESTION OF THE PROPER APPLICATION OF RULE 23(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, WHICH REQUIRES, UPON REQUEST, THAT SPECIAL FINDINGS BE MADE BY THE TRIAL JUDGE, AND WHETHER THE RULE APPLIES ONLY "WHERE BENCH TRIALS HAVE BEEN WAIVED AND WHERE A GENERAL FINDING OF GUILTY OR NOT GUILTY WILL RESULT", OR IF IT ALSO APPLIES TO A TRIAL ON THE FACTUAL ISSUES LEADING TO REVOCATION OF PROBATION WHERE IMPRISONMENT RESULTS. THIS IS AN IMPORTANT QUESTION OF PROCEDURE AFFECTING A CITIZEN'S LIBERTY WHERE HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This petitioner, after it had been ruled by the trial court that his probation would be revoked, and that he be made subject to a term of imprisonment for eighteen months made formal request for the Court to find the facts specially pursuant to Rule 23 of the Federal Rules of Criminal Procedure, 18 U.S.C. (App. 14) This the court denied on the ground that Rule 23 does not contemplate a hearing for Revocation of Probation. (App. 15)

The Court of Appeals agreed finding Rule 23(c) applies only "to bench trials where a jury has been waived and where a general finding of guilty or not guilty will result." (A. 5)

We submit that special findings of fact by a Court—sitting without a jury, are not confined to issues on charges of indictments. See *United States* v. *Johnson,* 327 U.S. 106, 66 S.Ct. 464, 466 (Motion for New Trial); *Alger* v. *United States,* 7 Cir., 171 F. 2d 667 (Motion to vacate sentence because of illegally selected jury). Even the case on which the trial court relied in denying the request for findings, *United States* v. *Koury,* 6 Cir., 319 F. 2d 75 (App. 15) implies that whenever evidence is introduced on issues of fact, Rule 23 applies:

> "One of the assignments of error on the appeal is that the trial judge did not make findings of fact and state conclusions of law. It was apparent on the face of the petition that, as a matter of law, the sentence was not illegal as claimed by the defendant. No findings of facts or statement of conclusions of law were required. When there was no trial by the Court, Rule 23(c) is not applicable." *United States* v. *Koury,* 6 Cir., 319 F. 2d 75, 77.

The Court of Appeals also relied on the *Koury* case as well as *Burns* v. *United States,* 287 U.S. 216 and *United States* v. *Taylor,* 4 Cir., 321 F.2d 339 (A. 6). We cannot see that these cases in any way endorse the procedure here, standing as they do, for the insurance that the probationer be treated fairly (287 U.S. at 223) and that a reviewing court must be certain from the record of the basis of revocation. (321 F. 2d at 342)

Here there was a trial by the Court and evaluation of the evidence was his duty. The reasons bottoming that evaluation should have been set forth on request made.

When a petition is made for revocation of probation, wherein a defendant is arrested on a warrant issued pursuant thereto, and evidence heard is, we submit, a "case tried without a jury" within the provisions of Rule 23(c) of the Federal Rules of Criminal Procedure and the mandate that the Court *shall* "on request find the facts specially" is operative.

This want of special findings by the trial judge—when requested—becomes particularly significant when the Court of Appeals affirms the order of probation on grounds deemed not significant by the trial judge.

II.

THE COURT OF APPEALS AFFIRMED THE ORDER OF PROBATION REVOCATION, AND IMPRISONMENT, ON GROUNDS CONSIDERED NOT SIGNIFICANT BY THE TRIAL JUDGE, THUS CHANGING ON APPEAL THE THEORY ON WHICH THE TRIAL COURT FOUND CULPABILITY. THIS IS NOT ALLOWED ON CIVIL CASES (WAGNER v. RETAIL CREDIT CO., 7 CIR., 338 F. 2d 598, SCHENFELD v. NORTON CO., 10 CIR., 391 F. 2d 420; IN RE BLACK RANCHES, INC., 8 CIR., 362 F. 2d 19). WHEN A REVIEW COURT, TO SUSTAIN A REVOCATION ORDER, FINDS THE FACTS INDEPENDENT OF, AND CONTRARY TO, THE TRIAL JUDGE, A MISCARRIAGE OF JUSTICE RESULTS, (SHUPE v. NEW YORK CENTRAL SYSTEM, 7 CIR., 339 F.2d 998) WHICH THIS COURT, IN ITS SUPERVISORY POWER IS OBLIGED TO CORRECT.

It is clear from the record that the trial court considered the probation order breached because of "proof" that some $65,000 in government bonds had some nine to ten years prior to and long after making of the "false" statement to Internal Revenue, been purchased by him.

To support continued possession at the time of the statement, the Government introduced Exhibit 36 (a "statement" by the Bureau of Public Debt that the bonds were still outstanding), which concededly was without probative value.

In the absence of the findings requested, the Court of Appeals felt free to find in the record what portions it surmised would support the determination of the trial judge. Thus, it states:

> "Even disregarding that exhibit, there is ample evidence to support the revocation of defendant's probation. Defendant concededly had six life insurance policies in the total amount of $8,000 although he advised the Government on February 17, 1967, that he had no such policies. At the same time, he neglected to state that his sole proprietorship did banking business with the Bank of St. Louis."

The trial judge, on the record, was clearly unimpressed by the insurance policies and the small bank account and considered these to be without significance. Yet, in the absence of the findings of fact, those reactions of the fact-finder are actually overruled. The clear disposition of the trial court relative to the insurance and small bank account is clearly seen in the record:

> "The Court: Well, I don't think you have to concern yourself about any $10.00 item or anything like that, I think the big thing you've got to concern yourself with here is $55,000.00."
>
> * * *
>
> "The Court: Well, there's no dispute about that, that's been done, that's water over the dam, the big issue in this lawsuit is these Government Bonds."

Thus, the petitioner faces imprisonment on findings of the Court of Appeals, independent of and contrary to the fact finder, exercising a power in excess of its scope of review, in clear contravention of its legal limitations.

III.

WHERE THE REAL BASIS FOR THIS PROCEEDING LIES IN AN ASSERTION THAT THE PETITIONER HAS VIOLATED FEDERAL CRIMINAL STATUTES IN MAKING FALSE STATEMENTS TO THE INTERNAL REVENUE SERVICE (18 U.S.C. 1001 and 26 U.S.C. 7206) AND FACES IMPRISONMENT, PERMITTING THIS REVOCATION PROCEEDING WHERE THE BURDEN OF DISPROOF OF THOSE CRIMINAL CHARGES FELL UPON THE PETITIONER, HE HAS ACTUALLY BEEN STRIPPED OF HIS CONSTITUTIONAL PROTECTIONS AS AN ACCUSED, AND THIS DECISION CONFLICTS WITH BASIC CONSTITUTIONAL RIGHTS, AND THE MANY DECISIONS OF THIS COURT INSURING THOSE RIGHTS.

There is no question that the trial court considered the burden fell on this petitioner to disprove his continuing ownership of the bearer bonds purchased many years before his allegedly false statement. See the Court's statements quoted in footnotes 2 and 3 *infra*. It is clear that the trial court felt that the burden fell on the petitioner to take the stand and show the disposition of the bonds, and thus,—if the Court saw fit to believe him—prove his innocence.

The Court of Appeals was a worse offender against the presumption of innocence, and the Constitutional privilege, for it had before it the government's concession that the "certificate" of the Bureau of Public Debt was without evidentiary significance. Yet it obviously found proof of guilt in the petitioners' silence:

> "Nothing contra was introduced by defendant . . . Defendant did not deny continuing ownership of the notes during the revocation hearings despite the reiterated importunings of the trial judge." (A. 6)

These Courts abandoned the standard of even preponderance of evidence, and put the whole burden on the petitioner. It is without importance whether the form of the proceeding is a revocation hearing or any other, where the charge is a federal crime and the result is imprisonment, the Constitution demands proof beyond reasonable doubt. No excuse will be credited where a man's silence constitutes the basis for his conviction.

We respectfully direct the Court's attention to the separate concurring opinion of Mr. Justice Black in *Maggio* v. *Zeitz,* 333 U.S. 75, a case which spurned the presumption of continuing possession of goods in a bankruptcy proceeding.[5]

> "All court proceedings, whether designated as civil or criminal contempt of court or given some other name, which may result in fine, prison sentences, or both, should in my judgment require the same measure of proof, and that measure should be proof beyond a reasonable doubt. See Gompers v. United States, 233 U.S. 604, 610, 611, 34 S.Ct. 693, 695, 58 L.Ed. 1115; Michaelson v. United States, 266 U.S. 42, 66, 67, 45 S.Ct. 18, 20, 69 L.Ed. 162, 35 A.L.R. 451; Pendergast v. United States, 317 U.S. 412, 417, 418, 63 S.Ct. 268, 270, 87 L.Ed. 368.
>
> "The foregoing is written on the assumption that the turnover-contempt procedure is legal, an assumption which I do not accept. I share the opinion of the Circuit Court of Appeals that this procedure is unauthorized by statute and that it should not be permitted to take the place of criminal prosecutions for fraud as apparently was done here." 333 U.S. at 79 and 80.

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[5] We think a meaningful distinction should be drawn between a bankruptcy proceeding and this. Where the relief afforded by the bankruptcy laws is invoked, we think a greater burden devolves on him seeking that help.

IV.

SETTLEMENT IN FULL OF INCOME TAX LIABILITIES IS AN IMPERMISSIBLE CONDITION OF PROBATION BECAUSE BREACH OF THE CONDITION CONSTITUTES IMPRISONMENT FOR DEBT.

Settlement of tax liabilities, as a condition of probation is not authorized under the statutes.

So far as is pertinent, Title 18, U.S.C., Section 3651 provides:

> "While on probation and among the conditions thereof, the defendant—
>
> "May be required to pay a fine in one or several sums; and
>
> "May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; . . ." Title 18, U.S.C. §3651

We submit that payment of income taxes, plus penalties and interest constitute neither restitution nor reparation.

"Reparation" is defined by Black's Legal Dictionary, as the "redress of an injury; amends for a wrong inflicted"; by Webster's Unabridged Dictionary, in four definitions as:

> 1. a repairing or being repaired; restoration to good condition.
>
> 2. repairs.
>
> 3. a making of amends; a making up for a wrong or injury.
>
> 4. anything paid or done to make up for something else; compensation; specifically, (*usually pl.*) compensation by a defeated nation for damage done to civil-

> ians and their property in a war, payable in money, labor, goods, etc.

"Restitution" is defined by Black as

> So, on conviction of a felon, immediate *restitution* of such of the goods stolen as are brought into court will be ordered to be made to the several prosecutors. 4 Steph. Comm. 434.
>
> In Equity
>
> Restitution is the restoration of both parties to their original condition, (when practicable,) upon the rescission of a contract for fraud or similar cause.

and by Webster, in five definitions, all inapplicable, but the closest being

> 2. the act of making good, or of giving an equivalent, for any loss, damage, or injury; reimbursement; indemnification.

Payment of taxes is neither reparation nor restitution. It is moneys exacted of the citizenry and residents for the support of government. Taxes are payment of a bill the government tells us to serve upon ourselves. Civil penalties and interest are so clearly punitive as to make argument of their exclusion from lawful conditions of probation unnecessary.

"*Actual* damage or loss" will not, on the import of express terms, be satisfied by the presumption of correctness that usually attends the Commissioner's assessment. Actual damage or loss must be shown. It has not. Further the real status of this matter cannot be ignored. There is no suggestion that Mr. Weber has been other than a model probationer except in this regard. The effect of the revocation for failure to perform the special condition thereof, the settlement of his tax liabilities, is imprison-

ment, and it is imprisonment for failure to pay the bill. Again, Mr. Justice Black, in the *Maggio* case, recognizes the Constitutional impropriety:

> "This whole procedure flavors too much of the old discredited practice of imprisonment for debts—debts which people are unable to pay. For here, if petitioner did wrongfully dispose of the property, whether or not he was guilty of a crime, he was probably liable in some sort of civil action, basically similar to, if not actually one for debt. Had a judgment been obtained against him in such a civil case, I doubt if it would be thought at this period that the bankruptcy court could have thrown petitioner in jail for his failure to obey what would have been in effect a court order to pay the debt embodied in the judgment." *Maggio* v. *Zeitz*, 333 U.S. 75, 68 S.Ct. 401.

We submit, in this area where so many are affected, this Court should determine whether payment or *settlement* of taxes, is constitutionally a proper condition of probation for the breach of which condition, imprisonment follows.

We are not unaware that payment of taxes, penalties, and interest has, on occasion been made a special condition of probation. *United States* v. *Stoehr,* 3 Cir., 196 F. 2d 276, 284; *United States* v. *White,* 2 Cir., 417 F. 2d 89, 94; *Hensley* v. *United States,* 5 Cir., 257 F. 2d 681, 684; and *United States* v. *Taylor*, 4 Cir., 305 F.2d 183, 187-188. No reported case has ever directly dealt with the point here presented. Only the *Hensley* case did not reverse the revocation or order its modification. The leading case, giving some indirect approbation to the probationary condition is *Taylor* (305 F.2d at 187) and, even in that case, the controversy had not ripened so as to constitute it reliable authority.

CONCLUSION

Wherefore, this Petitioner respectfully prays the Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

ANNA R. LAVIN
EDWARD F. CASEY
Attorneys for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 JANUARY SESSION, 1971

18380

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NELSON E. WEBER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

February 17, 1971

Before HASTINGS, *Senior Circuit Judge*, CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In July 1964, defendant pled guilty to a three-count indictment charging him with filing fraudulent income tax returns in 1958, 1959, and 1960, in violation of 26 U.S.C. § 7201. In August 1964, he was ordered to pay a $5,000 fine on each count, together with costs. The imposition of any sentence of imprisonment

was suspended, and he was placed on probation for three years. In addition to compliance with the usual conditions of probation, the district court imposed the following:

> "Probationer is to pay court costs in the amount of $35.00 and a total fine of $15,000.00 (fined $5,000 on Count I, $5,000 on Count II and $5,000 on Count III) within 60 days. Payments are to be made by certified checks or money order, payable to William J. Littell, Clerk, U. S. District Court, Federal Building, Springfield, Illinois.
>
> "Probationer is to make settlement in full with the Internal Revenue Service for taxes owed for the calendar years 1958 through 1960, inclusive, including any legal penalties and interest, within the probation period. Probationer has the full right without any prejudice to this judgment entered to fully and completely and without restriction contest any tax and defend against any taxes that may be improperly taxed against him."

Defendant ultimately paid the fines and court costs. At the suggestion of the probation officer, the probationary period was extended until August 25, 1969, in order to give defendant additional time in which to settle his tax liabilities, which had been assessed in the amount of $176,703.46 for the period in question.

On August 14, 1969, the probation officer reported to the district court that defendant

> "has filed an alleged false [$10,000] offer in compromise on his tax liabilities in that: he filed a false Statement of Financial Condition; he has failed to cooperate with Internal Revenue Agents in their attempts to ascertain whether he has secreted assets.

> The Collection Division of Internal Revenue ascertained that Weber rented three safety deposit boxes, and subsequently that Division seized them on April 14, 1969. Since then the Collection Division has attempted to obtain voluntary permission from Weber to inventory the seized safety deposit boxes, which permission has not been obtained."[1]

Accordingly, the probation officer requested that an arrest warrant be issued and defendant brought before the court to show why his probation should not be revoked. Subsequently, the district court held three days of hearings, at which defendant refused to testify, culminating in a February 3, 1970, general finding that defendant had violated the terms and conditions of his probation order. Thereupon the court imposed concurrent sentences of eighteen months' imprisonment on each of the three counts.

Three days thereafter, defendant's counsel requested the court to find the facts specially, pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure. On February 11, 1970, the notice of appeal was filed, and six days thereafter, the district court entered an order that a hearing for revocation of probation does not fall within contemplation of said Rule and denied the motion for special findings of facts.

Defendant first argues that settlement of tax liabilities for the three years covered by the indictment is not a legitimate condition of probation. In *United States* v. *Steiner*, 239 F.2d 660, 661 (7th Cir. 1957), we held that the probationer who had accepted probation on condition that he make every effort to pay his tax liability to the

---

[1]At the oral argument, we were told that when opened, the safety deposit boxes contained nothing of interest to the Internal Revenue Service.

United States without challenging that condition on direct appeal was foreclosed from attacking the condition on his subsequent appeal from the order revoking probation. Even apart from any such foreclosure, however, we cannot accept this defendant's challenge to the tax settlement condition of his probation.

The applicable statute provides in part:

> "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> * * * * *
>
> "While on probation and among the conditions thereof, the defendant—
>
> * * * * *
>
> "May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had * * *." 18 U.S.C. § 3651.

As we pointed out in *Steiner*, the first paragraph of this statute empowers a district court to "place the defendant on probation for such period and upon such terms and conditions as the court deems best." Chief Justice Hughes ruled in *Burns* v. *United States*, 287 U.S. 216, 220, that the Federal Probation Act "confers an authority commensurate with its object and grants an exceptional degree of flexibility to a trial judge," permitting him to exercise a broad discretion in imposing conditions of probation. Even if it were not authorized by the generality of the

first paragraph of the Act, the restitution clause itself permits a trial court to condition probation on the payment of all federal income taxes finally determined to be due for the years involved. *United States* v. *Stoehr,* 196 F.2d 276, 284 (3d Cir. 1952), certiorari denied, 344 U.S. 826. As stated in *United States* v. *Taylor,* 305 F.2d 183, 187 (4th Cir. 1962), certiorari denied, 371 U.S. 894, restitution to the government is limited by that clause to those taxes that "are legally determined during the probational period to be owing and collectible." Defendant does not contest the validity of the assessment of the taxes, interest and penalties due as totaling approximately $200,000. He has made no showing whatsoever that the trial judge abused his discretion in imposing the tax payment as a condition to probation.

Defendant also asserts that the district judge was required to find the facts specially under Rule 23(c) of the Federal Rules of Criminal Procedure. This request was not made until several days after the general finding that defendant had violated the conditions of the probation order.[2] Assuming, *arguendo,* the timeliness of defendant's request, Rule 23(c) is inapplicable. Rule 23(c) governs bench trials where a jury has been waived and where a general finding of guilty or not guilty will result. 8 *Moore's Federal Practice,* § 23.05 (1970); Barron & Holtzhoff, *Federal Practice and Procedure,* § 2124 (Rules Edition). In such instances Rule 23(c) is mandatory upon a request for special findings of facts. *United States* v. *Morris,* 263 F.2d 594 (7th Cir. 1959). The district judge correctly concluded here that a probation revocation hear-

[2] Special findings of facts are to be entered at the same time as the general finding. *Benchwick* v. *United States,* 297 F.2d 330, 335 (9th Cir. 1961).

ing is not such a trial, so that Rule 23(c) is inapplicable. See *Burns* v. *United States*, 287 U.S. 216, 222; *cf. United States* v. *Koury*, 319 F.2d 75, 77 (6th Cir. 1963); *United States* v. *Taylor*, 321 F.2d 339, 342 (4th Cir. 1963).

Defendant next attacks the admission of Government Exhibit 36, which is a certificate of the Commissioner of Publi Debt that 13 specified $5,000 treasury notes, allegedly owned by defendant, were still outstanding on October 23, 1969, a week before the commencement of the hearing below. The Government now concedes that this document should not have been admitted if Rule 44 of the Federal Rules of Civil Procedure is applicable. However, a revocation hearing is an informal proceeding where rules of evidence need not be strictly observed. *United States* v. *Cates*, 402 F.2d 473, 474 (4th Cir. 1968). In this hearing without a jury, it will be presumed that the district judge accorded only appropriate weight to this exhibit. Nothing contra was introduced by defendant.

Even disregarding that exhibit, there is ample evidence to support the revocation of defendant's probation. Defendant concededly had six life insurance policies in the total amount of $8,000 although he advised the Government on February 17, 1967, that he had no such policies. At the same time, he neglected to state that his sole proprietorship did banking business with the Bank of St. Louis. The Government traced $65,000 in government notes to defendant even though they were purchased in company names. Those notes had also been omitted from the financial statement defendant submitted to the Government on February 17, 1967, when he endeavored to compromise his $200,000 tax liabilities for $10,000.[3] Defendant

[3] The trial judge characterized a 1964 mortgage on defendant's residence as an attempt to "further build up the picture of having no assets."

did not deny continuing ownership of the notes during the revocation hearings despite the reiterated importuning of the trial judge. As to three of those notes, a St. Louis banker testified that after he exchanged them for a new series, defendant complained that the transaction had been run through his sole proprietorship's account and should be deleted.

In an effort to avoid the ownership of the notes, defendant relies on *Maggio* v. *Zeitz*, 333 U.S. 56. There the Court concluded that a presumed continuance of possession from the time of bankruptcy to the time of the turnover order is not an absolute and that the bankrupt should be permitted to challenge the previous adjudication of possession. Although the Court decided that he should be permitted to establish lack of present possession, it held that he would "not meet the issue" by standing mute. 333 U.S. at p. 75. Here defendant offered no evidence to rebut the inference of present possession, so that *Maggio* is of no avail.

To upset a revocation of probation, there must have been an abuse of discretion on the part of the trial judge. *Burns* v. *United States*, 287 U.S. 216, 222. Here the deceitful conduct of defendant evinced lack of reform and amply supported the commitment judgment imposed for failure to comply with the tax "settlement in full" condition of the probation that had been accorded defendant.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Opinion by Judge Cummings

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Wednesday, February 17, 1971

Before

Hon. JOHN S. HASTINGS, *Senior Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 18380 vs.

NELSON E. WEBER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division

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This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

NO. 18380

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

NELSON E. WEBER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

Honorable Omer Poos, *Judge Presiding.*

PETITION FOR REHEARING

Anna R. Lavin
53 West Jackson Blvd.
Chicago, Illinois 60604
Attorney for Defendant-Appellant.

Edward F. Casey
1114 Ridgely Bldg.
Springfield, Illinois 62701
Of Counsel.

IN THE

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

NO. 18380

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

NELSON E. WEBER,
Defendant-Appellant,

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

Honorable Omer Poos, *Judge Presiding.*

PETITION FOR REHEARING

The defendant-appellant, Nelson E. Weber, respectfully prays the Court to rehear the instant matter on the following grounds:

I.

This Court appears to imply (Op. 18380, p. 4) that the motion for special findings under Rule 23(c) of the Federal Rules of Criminal Procedure was not timely made, relying on *Benchwick* v. *United States*, 9 Cir., 297 F.2d 330, 335. We respectfully submit that there is nothing in Rule 23(c) which forewarns of the immediacy of the request. In fact, the rule states that the Court "shall make a general finding and shall *in addition* on request find the

facts specially." It would appear that the general finding must necessarily precede the request for special findings. We recognize that the *Benchwick* case states "Rule 23(c) contemplates a single set of special findings entered at the time of the entry of the general findings." It finds, in fact, that such procedure is the only practicable one. However, the Third Circuit, in *United States* v. *Ginsberg*, 388 F.2d 12, affirmed, 86 S.Ct. 942, found the only practicable solution in that case was the delay of the entry of special findings, pending research. It would thus appear that the three day delay here in requesting special findings does not, certainly under the wording of the rule, or in practical application of the rule, foreclose the request.

II.

This Court also finds, at the same page, that Rule 23(c) is applicable only on an actual trial of the issues made by indictment and not guilty plea, after the waiver of a jury. In this it relies principally upon Moores Federal Practice. We would respectfully point out that Moores Federal Practice is not that definite, reading as follows:

> "Rule 23(c) applies to nonjury *trials* and not to determination of *motions* by the court. Where such motions involve controverted questions of fact, as for example under Rule 41, the court will make findings of fact in any event."

The word "trial" does not except this procedure where there were factual issues formed and presented for resolution. The available definitions of trial are as follows:

> "a. the examination before a judicial tribunal of the facts put in issues in a cause, often including issues of law as well as of fact. b. the determination of a person's guilt or innocence by due process of law." *Random House Dictionary of the English Language, The Unabridged Version.*

III.

In the absence of the findings, this Court has felt free to find in the record what portions it surmises will support the determination of the trial judge. Thus, it states:

> "Even disregarding that exhibit, there is ample evidence to support the revocation of defendant's probation. Defendant concededly had six life insurance policies in the total amount of $8,000 although he advised the Government on February 17, 1967, that he had no such policies. At the same time, he neglected to state that his sole proprietorship did banking business with the Bank of St. Louis. The Government traced $65,000 in government notes to defendant even though they were purchased in company names." (Op. p. 5)

The last sentence of the above loses significance when the actual fact that the "tracing" was over seven to ten years prior to the making of the statement, and, in regard to other bonds, long after the making of the statement on February 17, 1967. As to the insurance policies and the small account in the Bank of St. Louis, the trial judge found them to be without significance. Yet, in the absence of the findings of fact, those reactions of the fact-finder are actually overruled. The clear disposition of the trial court relative to the insurance and small bank account is clearly seen in the record:

> "The Court: Well, I don't think you have to concern yourself about any $10.00 item or anything like that, I think the big thing you've got to concern yourself with here is $55,000.00."
>
> * * *
>
> "The Court: Well, there's no dispute about that, that's been done, that's water over the dam, the big issue in this lawsuit is these Government Bonds."

IV.

This Court further finds, as is conceded by the Government, that Exhibit 36 does not conform to Rule 44. But continues:

> "However, a revocation hearing is an informal proceeding where rules of evidence need not be strictly observed. *United States* v. *Cates,* 402 F.2d 473, 474 (4th Cir. 1968). In this hearing without a jury, it will be presumed that the district judge accorded only appropriate weight to this exhibit. Nothing contra was introduced by defendant." (Op. p. 5)

The case of *United States* v. *Cates,* 4 Cir., 402 F.2d 473, concerns the use of hearsay which was not objected to at the time of the hearing, and continues that rules of evidence need not be strictly observed. In this instance, objection was made, and the grounds were clearly stated, and were exactly the ones presented on this appeal. As a matter of fact, Rule 44 is the authorization for hearsay if complied with and is thus, itself, an exception. That rule was so flagrantly violated that due process went out the window. The exhibit had absolutely no probative value. As such it shouldn't even have been considered by the trial judge. We submit that this Court's presumption that the district judge accorded it only appropriate weight is negated by the record:

> "The Court: * * * I think the big thing you've got to concern yourself with here is $55,000.00.
> "Mr. Casey: And the Government Bonds.
> "The Court: Yes.
> "Mr. Casey: Well—.
> "The Court: Traced into his possession, interest stopped on them, still they're not paid.
> "Mr. Casey: That's right, Your Honor.
> "The Court: That means that he's got them."

* * *

"The Court: It was shown that these bonds were traced into his company which he's the sole owner, $55,000.00 worth. Now, what has he done with it, there's still owing by somebody—still owing by the Government to somebody—."

* * *

"The Court: Well, there's—the bonds are still owing by the Government

"Mr. Casey: Well, that's true, Your Honor.

"The Court: And the money from the bonds have been traced in to him. Now, has he burned the bonds or what did he do with them?"

* * *

"The Court: And it shows that those bonds are still outstanding, and it shows further, to my—by my analysis of what happened, that's he's trying to hide them."

The record clearly shows that the District Court accorded great weight to Exhibit 36, for it was only on the basis of Exhibit 36 that the foregoing remarks could have been made.

Finally, by the ultimate sentence in the opinion quote above, this Court has devolved onto this defendant the obligation of disproving that which has not been proved. As the Court below commented adversely on the defendant's not electing to take the stand, so does this Court, not only in that quoted sentence, but also noting the "reiterated importunings of the trial judge" that he should do so.

This Court relies on a statement in *Maggio* v. *Zeitz*, 333 U.S. at p. 75 where it is said that a defendant would "not meet the issue" by standing mute. That case was, of course, cited by the defendant on the issue of the presumption of continued possession. However, in fairness

to the defendant, an element necessary to the invocation of the evidentiary "rule" must be present. A complete quote follows:

> "But application of that rule in these civil contempt cases means only that the bankrupt, confronted by the order establishing prior possession, *at a time when continuance thereof is the reasonable inference,* is thereby confronted by a prima facie case which he can successfully meet only with a showing of present inability to comply. He cannot challenge the previous adjudication of possession, but that does not prevent him from establishing lack of present possession. Of course, if he offers no evidence as to his inability to comply with the turnover order, or stands mute, he does not meet the issue." (Emphasis Supplied) *Maggio* v. *Zeitz,* 333 U.S. 75, 68 S.Ct. 401.

Certainly, continued possession is an unreasonable inference here, when the bonds have long since matured, and, if held, are no longer bringing in interest. We submit it would be well if this Court considered the separate opinion of Mr. Justice Black in that case:

> "All court proceedings, whether designated as civil or criminal contempt of court or given some other name, which may result in fine, prison sentences, or both, should in my judgment require the same measure of proof, and that measure should be proof beyond a reasonable doubt. See Gompers v. United States, 233 U.S. 604, 610, 611, 34 S.Ct. 693, 695, 58 L.Ed. 1115; Michaelson v. United States, 266 U.S. 42, 66, 67, 45 S.Ct. 18, 20, 69 L.Ed. 162, 35 A.L.R. 451; Pendergast v. United States, 317 U.S. 412, 417, 418, 63 S.Ct. 268, 270, 87 L.Ed. 368.
>
> "The foregoing is written on the assumption that the turnover-contempt procedure is legal, an assumption which I do not accept. I share the opinion of the Circuit Court of Appeals that this procedure is unauthorized by statute and that it should not be per-

mitted to take the place of criminal prosecutions for fraud as apparently was done here. This whole procedure flavors too much of the old discredited practice of imprisonment for debts—debts which people are unable to pay. For here, if petitioner did wrongfully dispose of the property, whether or not he was guilty of a crime, he was probably liable in some sort of civil action, basically similar to, if not actually one for debt. Had a judgment been obtained against him in such a civil case, I doubt if it would be thought at this period that the bankruptcy court could have thrown petitioner in jail for his failure to obey what would have been in effect a court order to pay the debt embodied in the judgment." *Maggio* v. *Zeitz,* 333 U.S. 75, 68 S.Ct. 401.

Singularly, *Maggio* v. *Zeitz,* reaffirms the Supreme Court decision in *Oriel* v. *Russell,* 278 U.S. 358. There the Supreme Court adopted language from *Re Epstein,* 206 Fed. 568, partially as follows:

"In the pending case, or in any other the court may believe the bankrupt's assertion that he is not now in the possession or control of the money or the goods, and in that event the civil inquiry is at an end; but it is also true that the assertion may not be believed; and the bankrupt may therefore be subjected to the usual pressure that follows willful disobedience of a lawful command, namely, the inconvenience of being restrained of his liberty. No doubt this may be unpleasant; it is intended to be unpleasant; but I see no reason why the proceeding should be condemned, as if it interfered with the liberty of the citizen without sufficient reason or excuse. I have known a brief confinement to produce the money promptly, thus justifying the court's incredulity, and I have also known it to fail. Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order, he has always been released, and

> I need hardly say that he would always have the right to be released, as soon as the fact becomes clear that he cannot obey." *Oriel* v. *Russell,* 287 U.S. 358, 366.

No such relief is available to Nelson Weber.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court grant a rehearing and on such rehearing, reverse the judgment of the Court below.

Respectfully submitted,

Anna R. Lavin,
Attorney for Defendant-Appellant.

In The

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 18380

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

NELSON E. WEBER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

Honorable Omer Poos, Judge Presiding.

NOTICE

To: Honorable Frank J. Violanti
United States Attorney
Attn: J. William Roberts
P.O. Box 375, Federal Building
Springfield, Illinois 62705

Edward F. Casey, Esq.
Casey and Casey
Attorneys at Law
1114 Ridgely Building
Springfield, Illinois 62701

Please Take Notice that I have, on this day, filed with the Clerk of the United States Court of Appeals for the

Seventh Circuit, a Petition for Rehearing on behalf of the above Defendant-Appellant, two (2) copies of which Petition are herewith served upon you.

Anna R. Lavin

53 W. Jackson Blvd.
Chicago, Illinois 60604
922-3113

PROOF OF SERVICE

State Of Illinois
County of Cook—ss.

Patricia L. Wall, being first duly sworn on oath, deposes and says that each of the parties appearing on the attached Notice was served a copy of said document and a copy of the papers mentioned in said document as being attached thereto, by delivering to said addressees copies of said document and the papers accompanying it, by United States mail; that said copies of said document and accompanying papers were enclosed in sealed envelopes, properly addressed to said addressees, with sufficient United States postage affixed to the envelopes, and same were deposited in the receptacle for United States mail located in the Monadnock Building, 53 West Jackson Boulevard, in Chicago, Illinois on the 3rd day of March, 1971.

Patricia L. Wall
Affiant

Patricia M. Heinz
Notary Public

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Monday, March 8, 1971

Before

Hon. JOHN S. HASTINGS, *Sr. Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

No. 18380

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

NELSON E. WEBER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

It Is Ordered by the Court that the petition for rehearing filed in the above-entitled cause be, and the same is hereby denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago, Illinois 60604

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of

1. Appellant's Appendix Filed September 23, 1970;
2. The Opinion Filed February 17, 1971;
3. The Judgment Filed February 17, 1971;
4. Appellant's Petition For Rehearing Filed March 3, 1971;
5. The Order Entered March 8, 1971 Denying Appellant's Petition For Rehearing.

Cause No. 18380

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

NELSON E. WEBER, *Defendant-Appellant.*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 25th day of March, A.D. 1971.

Kenneth J. Carrick
Kenneth J. Carrick
Clerk of the United States Court of Appeals
for the Seventh Circuit.

(Seal)